No. 82-1176

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1982

WYNETTE E. BENNETT, Administratrix of
the Estate of EDWIN N. BENNETT,

Petitioner,

vs.

ENSTROM HELICOPTER CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. IS THERE ANY SPECIAL AND IMPORTANT REASON FOR THIS HONORABLE COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17?

II. WILL THIS COURT CONSIDER AN ISSUE NOT PLEADED OR RAISED IN EITHER THE DISTRICT COURT, OR THE COURT OF APPEALS UNTIL AFTER DENIAL OF A DELAYED MOTION FOR REHEARING IN THE COURT OF APPEALS?

III. HAS THE COURT OF APPEALS ERRED IN ITS DECISION?

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In addition to the opinions of the Court of Appeals set forth in the plaintiff's brief at page 5, it is also to be noted that following the denial of the first motion for rehearing, 686 F2d 406, on August 12, 1982 (A5), on or about November 9, 1982, the plaintiff then filed a motion to enlarge the time, and also a petition for second rehearing based on the contention, for the first time, that exemplary damages were not barred by the New Zealand Accident Compensation Act, citing Donselaar v Donselaar. In opposition to that motion, the defendant argued that plaintiff had never pleaded or raised the question before the District Court and quoted from United States Ex Rel Huisinga v Commanding Officer, 446 F2d (8 CA) 124 (1971), "it is an elemental rule of appellate jurisdiction that a reviewing court

will not ordinarily rule on issues not properly presented or raised in the trial court * * *. Similarly, an appealing party is precluded from altering the theory on which the case was tried in the lower court." Also it was pointed out that the plaintiff did not comply with Rule 44.1 of the Federal Rules of Civil Procedure, and lastly that the Donselaar case is not applicable to the facts of our instant case.

The Court of Appeals, by order dated December 6, 1982, denied the plaintiff's Motion to Enlarge Time to file second Petition For Rehearing (A 14-15).

COUNTER-STATEMENT OF THE CASE

We submit the plaintiff, at page 8 of her brief, has made a statement which does not appear in the appendix. It is stated: "The engine failure which caused the accident was familiar to Meger, because identical failures had caused accidents while a helicopter was being tested in the United States."

Reference to the deposition of Mr. Meger fails to substantiate that statement. Mr. Meger testified that once, at the plant, a backfire had occurred on a start-up and he had gotten out of the helicopter and found the hose detached (Meger deposition, p 40). There was no testimony the hose blocked up and caused the engine to quit. And further, he testified that after the accident in New Zealand, he found the hose detached at the air filter end but you would still be getting air to the

engine if you had a loose flopping hose. They did not believe at that time after bending the hose around and all over that the loose end could get on a big enough flat surface to shut off the air to the engine (Meger deposition, p 36). In other words, Mr. Meger was certainly not familiar with the cause of the engine failure prior to the time of the accident. No engine had previously failed even once before the accident because of that cause.

We submit the following additional facts: The District Court opinion states:

> "Plaintiff seeks recovery of $1 million damages under the Michigan Wrongful Death Act, MCLA §600.2922; MSA27A. 2922, on four counts: breach of implied warranty of fitness, breach of express warranty, negligence, and breach of implied duties of care owed to the bailee."
>
> (A 17; see also A 26).

Then on appeal to the Court of Appeals for the Sixth Circuit, only one question was presented in the plaintiff's brief:

"WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE NEW ZEALAND ACCIDENT COMPENSATION ACT BARRED A NEW ZEALAND PLAINTIFF FROM BRINGING A WRONGFUL DEATH CLAIM UNDER MICHIGAN LAW IN A MICHIGAN COURT AGAINST A NEGLIGENT MICHIGAN DEFENDANT, WHERE THE LAW IN SUPPORT OF THE DISTRICT COURT'S DECISION IS NEUTRAL AT BEST, AND THE PUBLIC POLICIES OF BOTH NEW ZEALAND AND MICHIGAN FAVOR RECOGNITION OF SUCH AN ACTION IN MICHIGAN."

(Our underlining).

And at page 11 of the brief, it is said:

"When these equities are weighed, in conjunction with the undisputed factual record, there can be no doubt that the District Court committed reversible error in holding that the New Zealand Accident Compensation Act barred a New Zealand plaintiff from bringing a Wrongful Death claim under Michigan law in a Michigan court against a negligent Michigan defendant, where the law in support of the District Court's decision is neutral at best and the public policies of both New Zealand and Michigan favor recognition of such an action in Michigan."

The opinion of the Court of Appeals reads in part:

"The lex loci, the law of New Zealand, no longer permits common law personal

injury actions. New Zealand has instead created a comprehensive administrative scheme of no-fault compensation for persons injured there. See generally Palmer, Accident Compensation in New Zealand: The First Two Years, 25 Am. J. Comp. L. 1, passim (1977).

"On appeal, Bennett argues that the district court misconstrued New Zealand statutes or erred in applying New Zealand law. She points out that the New Zealand Compensation Act provides that no person covered under the Act may bring a personal injury action 'in any court of New Zealand independently of this act . . . .' Id. §5(1). Bennett's argument is that since her action was not brought 'in any court of New Zealand,' then this exclusive-remedy provision does not apply to her case. We agree, of course, with Bennett's implicit premise that the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states. We reject her conclusion that if the New Zealand Act's exclusive-remedy provision is inapplicable, then a Michigan court, ostensibly applying New Zealand substantive law, would ignore the rest of the Compensation Act and apply the Michigan Wrongful Death Act to her case. There is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the Compensation Act. Bennett is covered by the Act, and has in fact received compensation under it. If the lex loci applies, plaintiff Bennett loses.

"Bennett prevails only if there is some reason to bend the Michigan conflicts rule of lex loci delicti.

* * *

"Bennett has pointed out no expression of public policy in any of these sources that would support application of Michigan substantive law to every case in which a product manufactured there has caused personal injury."

(A. 2-3).

Plaintiff then filed a petition for rehearing relying on Sexton v Ryder Truck Rental, Inc, 413 Mich 406 (1972). In our brief in opposition to plaintiff's petition, we stated:

"And in the Sexton and Storie cases, a majority of the Michigan Supreme Court, consisting of seven members, have held lex loci delicti applies unless the parties are both Michigan residents."

Upon reconsideration of the petition for rehearing based on the two Michigan cases, the Court of Appeals said in part:

"Since this Court's original decision in this diversity case, the Supreme Court of Michigan has substantially changed the relevant law of

that state by its decisions in Sexton v Ryder Truck Rental, Inc. and Storie v Southfield Leasing, Inc., Nos. 61606, 63362 (Mich., June 14, 1982) (hereinafter Sexton). The determinative issue in this case remains whether a Michigan court would apply Michigan substantive law, the lex fori, to Bennett's action. Bennett's petition for rehearing relies on Sexton in arguing that Michigan would now apply its own law. We reaffirm our earlier holding that Bennett's cause would be decided by a Michigan court according to New Zealand substantive law, the lex loci delicti, which would bar the action, and we note that this holding is not attacked in Bennett's petition for rehearing."

(A. 6-7).

* * *

"We believe that a Michigan court would find the following reasons for applying the law of New Zealand to this case:

> "'The plaintiff and her decedent were New Zealanders at the time of the alleged torts (D. Ct. mem. op. at 1);
>
> "'The plaintiff has received compensation for her injury under the laws of New Zealand (id at 2);
>
> "'The flight on which Mr. Bennett died began and ended in New Zealand (id. at 4).

"'The fatal helicopter had been shipped to New Zealand for sale and use there (id.);

"'There was no helicopter sale and no employment contract between Mr. Bennett and Enstrom of Michigan, although there may have been business contracts between them in Michigan (id. at 5);

"'The fatal helicopter had been lent to Mr. Bennett for his own purposes on the day of his death (id.).'

"Bennett has not challenged any of these findings of fact as clearly erroneous. Singly and together, these facts show that the State of Michigan has little interest in applying its own laws to this case."

(A. 10-11).

As previously noted, the motion to enlarge the time and also a petition for second rehearing was filed, reading in part as follows:

"All of the arguments previously filed by the plaintiff in this diversity action have addressed the legal and equitable reasons for applying Michigan substantive law."

* * *

"However, the New Zealand Accident Compensation Act has recently been interpreted to permit a cause of action for exemplary or punitive damages under circumstances similar to those in the instant case. Donselaar v Donselaar, (Docket No. CA 145/77, March 19, 1982) Since the United States Court of Appeals has determined to apply New Zealand law, and New Zealand law permits the plaintiff to maintain an action for exemplary damages, dismissal of the plaintiff's claim is no longer warranted.

* * *

"Accordingly, Plaintiff prays that this Honorable Court remand this cause to the United States District Court for the Western District of Michigan for further proceedings consistent with the opinion which has been rendered by the New Zealand Court."

By order filed December 6, 1982, the Court denied the plaintiff's motion to enlarge the time to file second petition for rehearing (A. 14-15).

Plaintiff-petitioner has now filed this petition for writ of certiorari alleging, page 13 of her brief, as "REASONS FOR GRANTING THE WRIT": "THE COURT OF APPEALS REFUSED TO FOLLOW THE DECISIONS OF

"THE MICHIGAN SUPREME COURT AND THE NEW ZEALAND COURT OF APPEALS, WHICH WERE ISSUED SUBSEQUENT TO ORAL ARGUMENT IN THE SIXTH CIRCUIT, AND TOGETHER PERMIT PLAINTIFF TO MAINTAIN HER CAUSE OF ACTION".

ARGUMENT

I. THERE IS NO SPECIAL AND IMPORTANT REASON FOR THIS HONORABLE COURT TO GRANT WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.

Supreme Court Rule 17.1 reads as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal

question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

This case was brought in the Federal Court solely by reason of diversity of citizenship with no involvement of any federal question of law. We submit that petitioner fails to come within any of the criteria set forth in said rule.

II. THE SUPREME COURT WILL NOT REVIEW A MATTER NOT PLEADED IN THE COMPLAINT AND NOT CONSIDERED BY THE DISTRICT COURT OR THE COURT OF APPEALS.

Prior to the filing of this petition for writ of certiorari, petitioner has always argued that the law of New Zealand did not prevent her from recovery under the wrongful death act of Michigan. Never before has the plaintiff contended as she now does at page 17 of her brief that in addition to the remedy under the New Zealand Accident Compensation Act, she also may recover under the common law remedy for wrongful death based on negligence, and then in a footnote acknowledges that at common law the action dies with the litigant, but that was displaced by the 1936 Law Reform Act as well as the 1952 Act presumably both being New Zealand death acts enacted prior to the ACA Act. In other words, she now for the first time

claims a right to recover under a New Zealand wrongful death act. Incidentally, petitioner has failed to comply with Rule 44.1 of the Federal Rules of Civil Procedure and has also failed to set forth the New Zealand act in the appendix as required by Supreme Court Rule 21.1(f).

Plaintiff is now arguing a position not set forth in her Complaint or relied upon in either the District Court or the Court of Appeals. We submit that the Court of Appeals as well as this Court will not entertain such a position under these circumstances. (In a succeeding section, we take issue with plaintiff's position that a cause for tort damages under a New Zealand wrongful death act occurring in New Zealand is maintainable).

Also, plaintiff has never pleaded a right to exemplary damages (A. 206) nor

previously claimed before the District Court, nor in the Court of Appeals until her delayed petition for second rehearing that she is entitled to rely on exemplary damages. In addition to the cases previously cited that a Court of Appeals will not usually consider matters raised for the first time on appeal, nor permit an altering of theory for the first time on appeal, we also cite Miree v DeKalb County Ga., 97 SC 2490, 433 US 25, 53 L.Ed.2d 557.

III. THE COURT OF APPEALS HAS NOT ERRED IN ITS RULINGS.

(a) NEW ZEALAND ACCIDENT COMPENSATION ACT OF 1972 DOES NOT PERMIT A RECOVERY UNDER ANY ALLEGED NEW ZEALAND WRONGFUL DEATH ACT FOR A DEATH OCCURRING IN NEW ZEALAND.

The title of ACA reads:

"An Act to make provision for safety and the prevention of accidents; for the rehabilitation and

> compensation of persons who suffer personal injury by accident in respect of which they have cover under the Act; for the compensation of certain dependents of those persons where death results from the injury and for the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident and death resulting therefrom and certain other actions."
>
> (A. 274, 94). (Our underlining).

The 1972 ACA is very lengthy. Briefly, however, the Act is a no-fault act providing fixed cover for any person injured or killed in New Zealand. In addition, it applies cover to certain persons injured or killed outside New Zealand, namely New Zealand seamen, airmen, members of the armed forces, diplomats, or an employee or employer injured outside New Zealand within twelve months of the time he temporarily left New Zealand.

Section 5(1)(a) provides that no action for personal injuries or death shall lie where that person has cover under the

Act "except any action which lies in accordance with section 131 of this Act". (A. 30). Dr. Palmer, cited in our Court of Appeals decision, states that section 5 should be interpreted "as barring all actions for damages, save punitive damages in the narrow range of circumstances in which they should be available where personal injury by accident is covered under the Act." (A. 116). Section 131 provides:

> "Compensation under Act in cases where claim lies over seas etc.
> "(1) In any case where a person suffers injury by accident outside New Zealand or dies as a result of personal injury so suffered, if the person has cover under this Act." (A. 33-34). (Our underlining).

And if an action lies for damages under the laws of that country, then, the action for damages may be maintained and an offset against the cover under the ACA is effected.

Thus, this would give a seaman, for example, who suffered an injury or death while in Michigan, a right to recover

damages under Michigan law.

The amendment (A. 36) enacted in 1978, four years after the accident in question, and we submit not applicable, provides that an action may be maintained under section 131 where the injury occurred either inside or outside New Zealand. Again we submit that only applies if Michigan, for example, permits recovery to a New Zealand person, for example, injured in New Zealand. In other words, as stated in the opinion of the Court of Appeals, "the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states". However, that does not thereby mean that New Zealand states that the Michigan Wrongful Death Act shall apply to a New Zealand resident who suffers an accident in New Zealand.

As previously noted, plaintiff sought recovery under the Michigan Wrongful Death

Act (A. 270). Now petitioner seeks recovery under an alleged New Zealand wrongful death act.

Petitioner has concluded by stating in her brief, pages 19-20:

> "In disregarding this obligation, the court of appeals sanctions a gross miscarriage of justice, depriving this petitioner of the recovery she could have obtained if suit had been brought in New Zealand in the first instance."

We respectfully submit that there has never been any question that if the case were brought in New Zealand, petitioner would clearly be barred from recovery of damages under any New Zealand wrongful death act. Plaintiff cites no case to support her present position.

(b) MICHIGAN APPLIES THE LAW OF LEX LOCI, NAMELY THE LAW OF MICHIGAN, ONLY WHERE BOTH PARTIES, INJURED IN ANOTHER STATE, ARE MICHIGAN RESIDENTS.

As previously noted, the plaintiff

and decedent were residents of New Zealand, the accident occurred in New Zealand, and the plaintiff was granted recovery under the New Zealand Accident Compensation Act. The majority of the Supreme Court in the recent case of Sexton v Ryder Truck Rental, 413 Mich 406, 320 NW2d 843 (1982), would hold that under such circumstances the law of New Zealand, not the law of Michigan, would be applicable.

The Court of Appeals did not err in so holding.

(c) EXEMPLARY DAMAGES NOT RECOVERABLE UNDER THE UNDISPUTED FACTS OF THIS CASE.

Although New Zealand has recognized the right to exemplary or punitive damages since the year 1278 (A. 276), and although the argument that the New Zealand ACA did not bar actions from exemplary damages was available to the plaintiff had she chosen

to raise it, it was not raised until the delayed second petition for rehearing before the Court of Appeals. In other words, this is not a case where the New Zealand court has changed or overruled prior law.

In any event, in Donselaar v Donselaar decided March 19, 1982 and now relied upon by the petitioner, the defendant struck his brother with a hammer on the head during an altercation (A. 37-38, 87-88).

The lengthy opinion by all three judges of the New Zealand Court of Appeals (A. 37-131) held that an action for exemplary or punitive damages is not barred by the New Zealand ACA. After defining exemplary or punitive damages, the court concluded that the facts of that case did not merit recovery of exemplary damages (A. 6).

Each of the judges stated that exemplary damages are not compensation but

are for the purpose of punishment and as a deterrent to highhanded contumelious activity (A. 41, 54, 58, 64, 76, 78, 79, 127).

Judge Sommers stated: "I express my agreement with the observation of Cooke J. about the need for restraint in this area" (A. 60).

Judge Richardson concluded his opinion by stating that plaintiff merely pleaded what in reality were compensatory damages (A. 84). That the wrangling was instigated by plaintiff as the principal irritant (A. 84).

Judge Cooke quoted from Dr. Palmer that the conduct must be so wanton as to be akin to an intentional tort (A. 116). Judge Cooke also said "the number of cases will not be many" (A. 118). The judge continued by stating, "I think there is need to have effective sanctions against the irresponsible, malicious or oppressive use of power; and also to maintain a puni-

tive remedy for the commonplace types of trespass or assault, if accompanied by insult or contumely, which touch the life of ordinary men and women." (A. 124-125).

He further stated, "the Courts will have to keep a tight reign on actions * *" (A. 128). Trial Judges should "not lightly allow a claim to go to a jury." (A. 128).

He further stated, "the present case is also an example, in my opinion, of a claim for exemplary damages that should not be entertained" (A. 129). That here there was some provocation, and on the evidence taken as a whole, "a prima facie case for the serious and exceptional remedy of exemplary damages was not made out" (A. 131). It is manifestly a case where the remedy should not be granted. (A. 131).

Taylor v Beere was a libel action.

These cases obviously are no authority for the granting of exemplary damages under the undisputed facts in our instant case.

CONCLUSION

This case does not involve any contested issue of federal law. The only reason that it was brought in a federal court was solely on the basis of diversity of citizenship. The matters set forth in Supreme Court Rule 17 which might merit a granting of the writ are not present. Further, the Court of Appeals has committed no error.

Wherefore, respondent respectfully requests this Honorable Court to deny petitioner's petition for writ of certiorari.

Dated:
Jan. 20, 1983

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